## Questions Presented

1. Should this Court reverse a jury verdict which found that all of the facts and evidence presented at trial amply demonstrated that an individual publisher was actuated by malice in causing publication of a false photograph depicting the plaintiff engaged in a homosexual act of anal intercourse?

2. Is it constitutionally permissible to instruct a jury that actual malice may be found where the material in question has been fabricated by the publisher without any basis for believing it to be true?

3. Does due process require a reversal of liability where the jury was provoked by petitioners to award excessive damages in order to deter similar such behavior in the future?

4. Is the decision of a state intermediate appellate court "final" where it remands the case for a new trial on the issue of damages, which may involve federal constitutional questions?

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NO. 81-2102

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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HUSTLER MAGAZINE, INC. and LARRY C. FLYNT,
*Petitioners,*

*vs.*

ROBERT C. GUCCIONE,
*Respondent.*

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**On Petition for Writ a Writ of Certiorari to the Supreme Court of Ohio**

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## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Robert C. Guccione, respectfully requests that this Court deny the petition for a writ of certiorari to review the decision of the Ohio Supreme Court dated January 27, 1982 dismissing petitioners' appeal and to review the decision of the Court of Appeals of Franklin County, Ohio, dated October 8, 1981.

## Statement of the Case

The petition in this case raises no issue worthy of review by this Court. The first three questions presented incorrectly assume that the defendant was found liable without fault. Instead of raising federal constitutional issues, these questions merely address factual issues relating to the evidence of malice presented at trial. The last question presented offers the novel and erroneous theory that due process is somehow violated where a damage award is reversed as excessive but liability is upheld. Petitioners' appeal to the Supreme Court of Ohio was dismissed sua sponte "for the reason that no substantial constitutional question exists herein" (A. 1).

In the June 1979 issue of Hustler Magazine, published by the petitioners Hustler Magazine, Inc. and Larry Flynt, two male models were paid to pose nude engaging in the act of anal intercourse. The head of respondent Robert C. Guccione was cropped from an innocuous photograph of Mr. Guccione dining on his patio and superimposed on the man performing penetration in the homosexual, sodomous act (A. 72). The photograph was captioned "Bob Guccione Discovers Vaseline". Neither Flynt nor anyone else at Hustler Magazine actually believed Guccione to be a homosexual. No evidence was presented to support the truth of the manner in which Guccione was depicted in petitioners' false photograph.

The publication of this libelous photograph was the culmination of a campaign of malicious attacks upon Guccione, waged relentlessly by Flynt in the pages of Hustler Magazine. Twenty-five percent of petitioners' publications contained some disparaging reference concerning Guccione.

The evidence at trial established that Flynt was repeatedly cautioned to cease his campaign of malicious attacks upon Guccione: Guccione personally requested Flynt to halt such slurs; Guccione's attorney demanded in writing that Flynt cease his attack; one of Flynt's employees even suggested that disparaging references to Guccione be discontinued because of the potential danger of a lawsuit. Flyn't response was to escalate the pattern and content of his attack.

For example, the July 1975 Hustler Magazine included a feature naming Guccione "Asshole of the Month", accompanied by a vile and repulsive illustration with a likeness of Guccione. In May 1976, petitioners published a full-page cartoon in Hustler Magazine illustrating both Guccione and his girl friend Kathy Keeton. In the caption of the cartoon, Guccione was identified as "a popebaiting, angel faced greaseball", who had given the woman he had lived with for fourteen years a "dose" of "runny clap". Though Flynt denied knowledge of this cartoon at trial, the cartoonist who drew it testified that the cartoon had been personally commissioned by Flynt, who specified its content and supplied the cartoonist with photographs of Guccione and Keeton so that their likenesses could be accurately illustrated.

Respondent reacted to the publication of this cartoon by filing an $80 million lawsuit against Flynt and his magazine. Undeterred, Flynt continued his attack which finally resulted in the fabricated photograph depicting respondent commiting an act of anal intercourse. Thus, at the very same time that Flynt was being accused of malicious libel by Guccione in a lawsuit for millions of dollars, Flynt recklessly published a false photograph designed to further denigrate Guccione's reputation.

When Flynt was warned that his actions would result in a lawsuit, his response was that he hoped so because "it would give him the press he wanted." Flynt explained: "It would be four, five years to get into court and by then we would have more money than that in publicity."

In the June 1976 issue of Hustler Magazine, petitioners boldly announced their defiance to authority. In an editorial discussing the impact upon publishers of this Court's decision in *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976), petitioners wrote:

> "[T]hey are afraid to report *anything* other than the most bland inoffensive bullshit about *anybody* for fear of being slapped with lawsuits that might end up in the same Supreme Court that handed down this ridiculous decision . . .
>
> How will this latest restriction of our individual rights affect HUSTLER and its no-bullshit reporting policy? It won't. We'll continue to report matters as we see them in the same forthright, down-to-earth manner. Whether a person is a private citizen or a public figure, if he's an asshole, a shithead or a scumbag that's just the way you'll seem him in HUSTLER.
>
> • • •
>
> If this means the presses that print HUSTLER must be halted because of our editorial stance, then let them be halted. There will be no compromise."

Petitioners sound the same note in response to an adverse obscenity decision issued by a Cincinnati court. The presiding judge in the case was named "Asshole of the Month", and other participants were characterized as

"Farts in the Wind". Flynt, speaking through his magazine, stated:

> "After getting the shit kicked out of us in a courtroom, you'd think we'd be reluctant to take on the people who held us down and kicked us. But HUSTLER magazine doesn't back down and will never tuck its tail between its legs and run for cover."

This case went to the jury on a most heinous libel*, for which there wasn't a shred of truthful basis and which culminated a campaign of ever-increasing malicious attacks upon the respondent, his business and his associates. The record of malice on the part of petitioners is unparalleled. The jury had Flynt's defiance before them. They heard his pronouncement to the effect—I will not stop, you cannot make me, I will say whatever I please about anyone, the courts and the law be damned.

## Reasons for Denying the Writ

### A. The jury determined that Flynt acted with actual malice.

Respondent agrees that a public figure plaintiff can only recover damages by establishing that the defamatory falsehood was published with actual malice. The gravamen of petitioners' argument is that actual malice was not demonstrated as to Flynt. This contention, however, fails in two respect to raise an issue that should be considered by this Court: (1) it overlooks the trial

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* In ruling on petitioners post-trial motions, the trial court was constrained to observe that: "The libel involved in this action was of the grossest sort, most reprehensible in nature" (A. 51).

court's proper instructions to the jury on the actual malice standard and (2) it merely raises a factual dispute as to whether the evidence supported a finding of actual malice as to Flynt.

Petitioners entire position rests upon an incomplete quote of dicta from the Ohio appellate court decision. At page 25 of its petition, petitioners cite the appellate decision but omit the very next paragraph of text, which notes:

> "Since defendant Flynt admits he was publisher and chairman of the board of Hustler at the time in question, he is responsible for the libel of plaintiff in the June 1979 issue of Hustler, whether or not defendant Flynt had knowledge thereof prior to publication. *In addition, there is ample circumstantial evidence that the publication in the June 1979 issue of Hustler was a continuation of a policy previously established by defendant Flynt when he was president, as well as publisher and chairman of the board of Hustler*" (A. 24) (Emphasis added).*

In the first place, an appellate court's dicta as to Flynt's involvement cannot raise a constitutional question for this Court's review where the jury was properly instructed and the factual question of malice resolved against Flynt. Neither the parties nor the trial court ever suggested that Flynt's liability rested upon any notion of strict liability. No such instruction was given to the jury. Instead, the

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* At pages 23-24 of their petition, petitioners also provide a lengthy, but irrelevant, quote from the appellate court decision. That quote relates solely to the invason of privacy claim which was dismissed and is therefore not before the Court on this petition.

trial court properly charged the jury that plaintiff has the burden of proving actual malice by clear and convincing evidence, and that plaintiff must prove that Flynt had a high degree of awareness of the probable falsity of the material and entertained serious doubts as to the truth of the publication (A. 90). Petitioners' disappointment with the jury's determination of the *factual question* of malice hardly requires the intervention of this Court.

In the second place, the appellate court recognized that "ample circumstantial evidence" was presented to the jury to warrant a finding of malice against Flynt. This circumstantial evidence—"objective evidence from which the ultimate fact could be inferred "—has long been accepted as a way of proving actual malice. *Herbert* v. *Lando*, 441 U.S. 153, 165 n.15, 170 (1979). The record is replete with facts demonstrating Flynt's reckless disregard for the truth. In addition to the campaign of defamation launched by Flynt against Guccione from the inception of the publication of Hustler Magazine, Flynt's personal involvement with the June 1979 issue was supported by the following facts:

(1) Petitioners argue that Flynt was disabled and hospitalized prior to the publication of the June 1979 issue of Hustler Magazine, yet the magazine's 1978 financial statement noted: "The Chairman of the Board [Flynt] has resumed his full normal duties" (Ex. RRR);

(2) The October 1978 issue of Hustler Magazine boldly proclaimed on its cover "Larry's Back" (Ex. U);

(3) Flynt's certified public accountant testified that: "We were made aware that Larry Flynt comes

to the office and that he is undergoing physical therapy. And we have seen him in the office almost daily. And therefore, it doesn't seem appropriate to qualify either the 1977 or the 1978 financial statement with a caution that it did not appear to be a going concern" (Dubey Deposition, pp. 79-80);

(4) Flynt announced publicly in May 1979 and again in June 1979 that he assumed full responsibility for the material contained in Hustler Magazine (R. 441, 443);

(5) Even while Flynt was hospitalized, a copy of the magazine galleys was taken to him for his approval (R. 1781) and the Hustler staff was instructed that nothing went into the magazine without Flynt's personal approval (R. 1783);

(6) Flynt testified that the defamatory material in question depicted Guccione, and was so intended (R. 352);

(7) In February 1980 Flynt testified at the trial that only "in the last five issues I haven't seen anything that is down in it. I used to approve things that went in the magazine, but I don't any more." (R. 358).

Moreover, Flynt failed to offer even a scintilla of proof to show that there was any basis for his believing that Guccione was a homosexual. Most significantly, Flynt published this vicious libel at a time when he was already being personally sued by Guccione for defamation in the amount of $80 million! The jury reached its verdict after carefully considering all of the direct and circumstantial evidence of Flynt's reckless con-

duct. As the trial court held: "Obviously, the jury rejected out of hand Mr. Flynt's protestations of non-involvement, accepting plaintiff's evidence on that issue" (A. 51). Petitioners here merely seek to relitigate a factual determination made by the jury upon proper instructions.

**B. The jury was properly instructed on the actual malice standard.**

In his second question presented, petitioner Flynt complains that the trial court improperly instructed the jury that liability could be imposed upon a finding that the false photograph was "fabricated" or "the product of defendants' imaginations," and that the jury was not given a proper instruction on the actual malice standard.

By this argument, petitioners focus upon only one segment of the charge (A. 91) and blind themselves to the full explanation of actual malice given by the trial court:

> "I instruct you that as a public figure, plaintiff has the burden of proving to you that the publication complained of was published with what is known in the law as actual malice, and that he must make such proof by clear and convincing proof which is the standard of proof higher than a preponderance of the evidence.
>
> In order to prove that he has been libeled by the defendants, one or both of them, plaintiff must demonstrate that the defendants published the photographic presentation of the June 1979 issue of Hustler, and marked Exhibit A, in violation of the law. Plaintiff must prove not merely negligence or mere falsity of the publication. I instruct you

> that proof of actual malice requires clear and convincing evidence showing that the defendants published the material complained of with a high degree of awareness of the probable falsity of the publication, and that there be sufficient evidence to permit the conclusion that the defendants entertained serious doubts as to the truth of the publication in order for the standard of proof to be met.
>
> Actual malice is to be distinguished from personal malicious purpose or bad or corrupt motive or from personal spite or desire to injure the plaintiff, although such subjective facts may be relevant in your deliberations on the issue of whether or not actual malice has been shown by clear and convincing evidence." (A. 90-91)

Petitioners do not challenge the correctness of this instruction, but simply ignore it, preferring instead to pretend that the subsequent portion of the jury charge was given in isolation:

> "You may find actual malice to exist if you find the material complained of to be false and that:
>
> 1. The false material was fabricated by the defendants, or
>
> 2. The false material was the product of defendants' imaginations, or
>
> 3. The false material was based wholly on unverified accounts from anonymous sources, or
>
> 4. The photograph published is so inherently improbable that only a reckless man would have put it in circulation." (A. 91).

When read together with the prior charge on actual malice, this instruction cannot be seriously challenged. Indeed, it is lifted directly from this Court's decision in *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968):

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation."

It surely was not error for the trial court to give instructions based upon the teaching of this Court in *St. Amant* v. *Thompson*.

Petitioners erroneously claim at page 32 of their petition, without reference to the record or their appendix, that "[o]bjections were interposed by defense counsel to this aspect of the charge". The Ohio appellate court has already resolved this point by holding that "defendants did not interpose an express objection to the charge and, therefore, are precluded from raising the issue on appeal by Civ. R. 51(A)" (A. 28).

**C. Petitioners were not entitled to a jury instruction that the offensive and false photograph was protected as parody or satire.**

Petitioners claim that the trial court's instructions failed to account for the nature of the false photograph as "a fair satirization of Guccione's open sexual conduct . . ." (petition, p. 39). But the photograph was plainly neither "fair" nor a "satirization". As indicated above, petitioners never attempted to prove any basis for believing that Guccione was a homosexual or performed homosexual acts. The Ohio appellate court repeatedly addressed this point:

> "There was no effort to show the truth of the matters asserted in the publications involved . . ." (A. 17)
>
> ". . . the claim is predicated solely upon one publication, that of the June 1979 issue of Hustler depicting plaintiff engaging in an act of buggery with another man. Defendants at no time made any effort to even suggest that plaintiff in fact ever engaged in any such act." (A. 28)
>
> "There has been no contention made by defendants that plaintiff at any time engaged in conduct of the type depicted in the June 1979 issue of Hustler". (A. 28)

Petitioners urge this Court that the jury instructions were erroneous, yet they fail to point to any place in the record where a proper objection was raised or where their proposed version was submitted for the trial court's consideration. Petitioners' belated complaint on this issue has long been waived.

The inconsistent contention advanced in the petition is that the jury could improperly find liability without a

finding of actual malice. But this argument is directly contrary to the instructions given which, as explained earlier, completely and correctly set forth the actual malice requirement.*

In effect, petitioners are trying to create some constitutional immunity from libel out of the very reckless nature of their conduct. Thus, petitioners urge that because they fabricated the offensive photograph about Guccione, they are protected under the rubric of satire. But such a radical theory has never been adopted by the courts, is certainly not part of the First Amendment's guarantee of free speech and press and is not supported by even a single case.

In his leading treatise on torts, Dean Prosser states:

> "One common form of defamation is ridicule. It has been held to be defamatory to publish humorous articles, verses, cartoons, or caricatures making fun of the plaintiff, to heap ironical praise upon his head, to print his picture in juxtaposition with an article on evolution and a photograph of a gorilla, or with an optical illusion of an obscene or ludicrious deformity readily detected at a second glance. It is, of course, possible that humor may be understood by all who hear or read it as good natured fun, not to be taken seriously or in any defamatory sense; but when it causes adverse rather than sympathetic or neutral merriment, it becomes defama-

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* Petitioners argue that "treatment of a matter of legitimate public interest" invokes the actual malice test (petition, p. 40). That proposition, however, was rejected in *Gertz* v. *Welch*, 418 U.S. 323 (1974), when this Court declined to follow the holding of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). But the actual malice standard is applicable in any event because Guccione was found to be a public figure.

> tory." Prosser, *Law of Torts,* pp. 742-43 (4th ed. 1971).

Apparently, no one other than petitioners appreciated the "satire" involved in the offensive photograph. As the Ohio appellate court remarked:

> "While defendants contend that the picture was intended as satire, the innocent satire is so subtle that it escaped plaintiff, escaped the trial court, escaped the jury and escapes this court. To the average person viewing the picture in question, it is quite clear that it is intended to portray plaintiff Guccione engaging in an act of buggery, with no implication other than that he engages in such an act, despite the caption which might have a double meaning to those engaged in certain types of photography" (A. 28-29).

The Ohio courts have specifically rejected the defense of humor to a libel action. In *Goudy* v. *Dayton Newspapers, Inc.,* 14 Ohio App. 2d 207, 211 (1967), the court followed the New York rule:

> "The New York rule with respect to humorous words in libel actions is stated in *Triggs* v. *Sun Printing & Publishing Association,* 179 N.Y. 144, 155, 71 N.E. 739, 103 Am. St. Rep. 841, 66 L.R.A. 612, quoted in *Lamberti,* supra, as follows:
>
> "'• • • if, however, they can be regarded as having been published as a jest, then it should be said that however desirable it may be that the readers of and the writers for the public prints shall be amused, it is manifest that neither such readers nor writers shall be furnished such amusement at the expense of the reputation or business of another • • •'

> The opinion further states that jest is not justification 'unless it is perfectly manifest from the language employed, that it could in no respect be regarded as an attack upon the reputation or business of the person to whom it related'."

Even a work identified as pure fiction does not guarantee immunity from defamation. See *Bindrim* v. *Mitchell*, 92 Cal. App. 61 (1978), *cert. denied*, 444 U.S. 984 (1979). As the Fourth Circuit held in *Middlebrooks* v. *Curtis Publishing Co.*, 413 F.2d 141, 143 (4th Cir. 1969), "the fictional setting does not insure immunity" and "[r]eputations may not be traduced with impunity, whether under the literary form of a work of fiction or in jest", quoting from *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58 (1920).

The photograph itself together with petitioners' admission remove any doubt that the material sued upon was of and concerning Robert C. Guccione. The jury was properly instructed on the actual malice standard, so that the issue of parody or satire raises no constitutional question which requires review by this Court.

**D. A jury award of excessive damages does not necessarily taint its finding of liability.**

Petitioners' last question presented likewise fails to raise a constitutional issue for this Court's review. The allegations of "prejudicial misconduct" on the part of counsel are factual matters that have already been resolved by the Ohio courts.

Without any apparent purpose, petitioners dwell upon evidence and testimony presented at trial that exacerbated Guccione's claim for both compensatory and puni-

tive damages. But the damage awards were reversed by the Ohio appellate court, and the trial excerpts relied upon by petitioners have absolutely nothing to do with the question of liability.

For example, petitioners incredibly contend that a portion of counsel's closing argument asking the jury to punish Flynt and deter him from similar conduct (petition, pp. 46-48) and Guccione's testimony about other persons, such as his family and friends, who also suffered as a result of petitioners' libel (petition, pp. 51-52), is "the same evidence" necessary for the jury to find liability (petition, p. 54) and that the finding of liability is therefore "tainted and poisoned" with the passion and prejudice that caused an excessive damage award. This argument fails for several reasons: (1) the issue of liability in this case was clearly distinct from the issue of damages, i.e., what injuries were suffered by Guccione and to what extent Hustler and Flynt should be punished to deter them from future wrongdoing and (2) there was overwhelming evidence to uphold the finding of liability.

In a leading libel case, *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702 (5th Cir.), *aff'd*, 388 U.S. 130 (1965), the Fifth Circuit held that a remititur, rather than a new trial, was proper because the determination of liability was unaffected by the passion and prejudice which resulted in excessive damages. The court quoted with approval the appraisal of the district court: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." 351 F.2d at 707. Accordingly, "a jury's finding as to liability can be binding even though its monetary award is found to be excessive or even improperly influenced—our deference to

and faith in the jury system demands at least this much". *Edwards* v. *Sears, Roebuck and Co.*, 512 F.2d 276, 282 (5th Cir. 1975). Even where the court has concluded that a grossly improper and intemperate argument inflamed the jury, a new trial can be ordered on the issue of damages only, and a constitutional issue is not thereby raised requiring review by this Court. *Pingatore* v. *Montgomery Ward and Co.*, 419 F.2d 1138, 1142-44 (6th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970). Accord, *Gorsalitz* v. *Olin Matheson Chemical Corp.*, 429 F.2d 1033, *modified*, 456 F.2d 180 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1972); *Dorin* v. *Equitable Life Assurance Society*, 382 F.2d 73, 78 (7th Cir. 1967); *Dean* v. *Mitchum-Thayer, Inc.*, 450 F. Supp. 1, 3 (E.D. Tenn. 1978).

In addition, there are numerous reported state cases which have remanded for a new trial the issue of damages only, despite a finding of excessive damages due to passion and prejudice. See, *e.g.*, *Pearson* v. *Ford Motor Co.*, 32 Ill. App. 3d 188 (1975); *Louisville & Nashville Railroad Co.* v. *Mattingly*, 318 S.W.2d 844, 849-50 (Ky. 1958); *LaCombe* v. *Minneapolis Street Railway Co.*, 236 Minn. 86, 93-94 (1952); *Mangigian* v. *Toolin*, 77 R.I. 151 (1950); *Lee* v. *Zaske*, 213 Minn. 244, 249-50 (1942); *New Orleans & N.E.R. Co.* v. *Snelgrove*, 148 Miss. 890, 900-01 (1927); *F.E. Smith* v. *Great Northern Railway Co.*, 133 Minn. 192, 195-96 (1916); *Curtis & Gartside Co.* v. *Pigg*, 39 Okla. 31, 47 (1913).

Here, the overwhelming evidence of liability leaves no room for doubt that the defamatory photograph was published with actual malice. As the Ohio appellate court aptly observed:

> ". . . the claim is predicated solely upon one publication, that of the June 1979 issue of Hustler de-

> picting plaintiff engaging in an act of buggery with another man. Defendants at no time made any effort to even suggest that plaintiff in fact ever engaged in any such act. Rather, as noted above, defendants' defense was that this was satire, even though the actual act depicted was untrue. Construing the evidence most strongly in favor of defendants, reasonable minds could only conclude that defendants published this picture in the June 1979 issue of Hustler with reckless disregard for its truth or falsity, if not with actual knowledge of its falsity" (A. 28).

Later, the court notes that: "A careful review of the record impresses the reader with a definite pattern of unprovoked malice demonstrated by Defendants toward Plaintiff" (A. 53).

The factual question of malice is not connected or dependent upon the amount of compensatory and punitive damages to be awarded, so that any passion or prejudice which contaminated the damage issue did not affect the question of liability. The abundance of proof establishing actual malice on the part of both Hustler and Flynt is a factual matter that has already been carefully weighed by a jury and several Ohio courts—it surely does not invite review by this Court.

**E. The petition is jurisdictionally defective because of the absence of a final judgment.**

Review by this Court is expressly limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." 28 U.S.C. §1257. Thus, the very first jurisdictional predicate which must exist is the requirement of "finality." The journal

entry of judgment by the Ohio Court of Appeals recites that "this cause is remanded to [the Franklin County Court of Common Pleas] for a new trial upon the issue of damages" (A. 44).

The determination of the Ohio appellate court remanding the case for a new trial on the issue of damages is surely not "the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California,* 324 U.S. 548, 551 (1944). Because the judgment "should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved," the new trial ordered by the Ohio appellate court precludes review at this juncture. *Collins* v. *Miller,* 252 U.S. 364, 370 (1919); *Arnold* v. *United States,* 263 U.S. 427, 434 (1923).

The determination of damages in a new trial is not a mere ministerial act, but a plenary proceeding which may involve First Amendment considerations regarding the kind of damages a defamation plaintiff is entitled to recover. This Court ruled in *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62, 68 (1947), as follows:

> "Thus *the requirements of finality has not been met* merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example *where liability has been determined and all that needs to be adjudicated is the amount of damages.* Bruce v. Tobin, 245 US 18, 62 L ed 123, 38 S Ct 7; Martinez v. International Bkg. Corp. 220 US 214, 223, 55 L ed 438, 43, 31 S Ct 408; Mississippi C.R. Co. v. Smith, 295 US 718, 79 L ed 1673, 55 S Ct 830." (Emphasis added).

This is not the first time Flynt has sought premature review by this Court of a nonfinal judgment. In *Flynt* v. *Ohio,* —— U.S. ——, 69 L.Ed 2d 489 (1981), this Court dismissed Flynt's petition for certiorari for want of jurisdiction. The Court observed the general rule which precludes review "where anything further remains to be determined by a State court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the State", *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124 (1945), and proceeded to analyze the four categories of exceptions enumerated in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). None of these exceptions are applicable here, particularly since the trial on damages could give rise to other federal issues which petitioners may raise at a later date. As in *Flynt* v. *Ohio,* the new trial in this case may yet involve federal issues, so that it cannot be said on this petition that there is "no probability of piecemeal review with respect to federal issues." 68 L.Ed. at 488.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Dated: June 9, 1982

Respectfully submitted,

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